

ORIGINAL

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FILED IN THE
 UNITED STATES DISTRICT COURT
 DISTRICT OF HAWAII

JAN 03 2006

at 6 o'clock and 58 min. P.M.
 SUE BEITIA, CLERK

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Attorneys for Defendant
 POST-CONFIRMATION TRUST

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

WAYNE BERRY, a Hawaii citizen;

Plaintiff,

vs.

HAWAIIAN EXPRESS SERVICE,
 INC., et al.,

Defendants.

-) CIVIL NO. CV03-00385 SOM-LEK
-) (Copyright)
-)
-) **DECLARATION OF LEX R. SMITH**
-) **IN SUPPORT OF PCT'S MOTIONS**
-) **IN LIMINE FILED ON JANUARY 3,**
-) **2006; EXHIBITS 1 – 47 (VOL. 2 OF**
-) **2); CERTIFICATE OF SERVICE**
-)
-)

) Hearing Date: January 20, 2006
) Hearing Time: 2:00 p.m.
) Judge: Hon. Susan O. Mollway
)
) Trial Date: January 24, 2006
)

DECLARATION OF LEX R. SMITH

I, LEX R. SMITH, under penalty of perjury, state as follows:

1. I am an attorney licensed to practice law before all of the State and Federal Courts in the State of Hawaii and am one of the attorneys representing Defendant POST-CONFIRMATION TRUST for Fleming Companies, Inc. in this case.

2. Attached hereto as Exhibit 1 is a true and correct copy of excerpts from Plaintiff Wayne Berry's Answers to Post-Confirmation Trust for Fleming Companies, Inc.'s Second Set of Interrogatories to Plaintiff Wayne Berry.

3. Attached hereto as Exhibit 2 is a true and correct copy of an email chain between various parties regarding the production of documents dated from April 25, 2005 to July 12, 2005.

4. Attached hereto as Exhibit 3 is a true and correct copy of the report of Jeffrey Kinrich dated June 16, 2005.

5. Attached hereto as Exhibit 4 is a true and correct copy of the Second Amended Verified Complaint, filed June 18, 2004.

6. Attached hereto as Exhibit 5 is a true and correct copy of the

Copyright Registration paperwork prepared by Wayne Berry and dated October 19, 1999.

7. Attached hereto as Exhibit 6 is a true and correct copy of excerpts from the deposition of Wayne Berry dated July 1, 2004.

8. Attached hereto as Exhibit 7 is a true and correct copy of excerpts from the deposition of Wayne Berry dated May 19, 2005.

9. Attached hereto as Exhibit 8 is a true and correct copy of the report from Thomas Ueno dated March 1, 2005.

10. Attached hereto as Exhibit 9 is a true and correct copy of the proposed End User License Agreement dated October 29, 1999.

11. Attached hereto as Exhibit 10 is a true and correct copy of the proposed Addendum to (the) End User License Agreement dated October 29, 1999.

12. Attached hereto as Exhibit 11 is a true and correct copy of the proposed Memorandum Agreement further supplementing the End User License Agreement dated November 26, 1999.

13. Attached hereto as Exhibit 12 is a true and correct copy of Plaintiff Wayne Berry's Response to Defendant Fleming Companies, Inc.'s First Request for Answers to Interrogatories to Plaintiff Wayne Berry dated March 22, 2005.

14. Attached hereto as Exhibit 13 is a true and correct copy of excerpts

from the deposition of Wayne Berry dated May 18, 2005.

15. Attached hereto as Exhibit 14 is a true and correct copy of excerpts from the deposition of Wayne Berry dated February 5, 2003.

16. Attached hereto as Exhibit 15 is a true and correct copy of excerpts from Plaintiff Wayne Berry's Memorandum in Opposition to Defendant PCT's Motion for Partial Summary Judgment on Damages Filed on August 24, 2005 (Filed Stamped "Sealed By Order of the Court" September 15, 2005).

17. Attached hereto as Exhibit 16 is a true and correct copy of Plaintiff's Wayne Berry's Motion for Issuance of Preliminary Injunction dated May 28, 2004.

18. Attached hereto as Exhibit 17 is a true and correct copy of excerpts from court hearing testimony of Mark Dillon dated September 28, 2004.

19. Attached hereto as Exhibit 18 is a true and correct copy of excerpts from Plaintiff Wayne Berry's Memorandum in Opposition to Defendant Mark Dillon, Teresa Noa, Melvin Ponce, Sonia Purdy, Justin Fukumoto, Alfredda Waiolama, and Jacqueline Rio's Motion for Summary Judgment on Damages Filed on August 24, 2005.

20. Attached hereto as Exhibit 19 is a true and correct copy of Dr. Philip Johnson's Report prepared on or around December 2004 or January 2005.

21. Attached hereto as Exhibit 20 is a true and correct copy of Dr. Philip Johnson's Report dated February 25, 2005.

22. Attached hereto as Exhibit 21 is a true and correct copy of Dr. Philip Johnson's Report dated March 21, 2005.

23. Attached hereto as Exhibit 22 is a true and correct copy of excerpts from the deposition of Wayne Berry dated May 19, 2005.

24. Attached hereto as Exhibit 23 is a true and correct copy of Exhibit 27 from the Affidavit of Wayne Berry related to the Preliminary Injunction motion, dated September 20, 2004

25. Attached hereto as Exhibit 24 is a true and correct copy of excerpts from the Affidavit of Wayne Berry related to the Preliminary Injunction motion, dated September 20, 2004.

26. Attached hereto as Exhibit 25 is true and correct copy of excerpts from the July 22, 2005 deposition of Thomas Ueno.

27. Attached hereto as Exhibit 26 is a true and correct copy of the March 21, 2005 report of Thomas Ueno.

28. Attached hereto as Exhibit 27 is a true and correct copy of excerpts from this Court's October 21, 2005 Order on summary judgment.

29. Attached hereto as Exhibit 28 is a true and correct copy of excerpts from this Court's June 27, 2005 Order on summary judgment.

30. Attached hereto as Exhibit 29 is a true and correct copy of an agreement between Fleming and API dated on or about October 7, 1999.

31. Attached hereto as Exhibit 30 is a true and correct copy of a correspondence from API to Fleming dated on or about September 16, 1999.

32. Attached hereto as Exhibit 31 is a true and correct copy of excerpts from hearing testimony from Wayne Berry dated February 25, 2003.

33. Attached hereto as Exhibit 32 is a true and correct copy of excerpts from the December 27, 2005 report of Thomas Ueno.

34. Attached hereto as Exhibit 33 is a true and correct copy of excerpts from this Court's October 8, 2004 Order Denying Plaintiff Wayne Berry's Motion for Preliminary Injunction.

35. Attached hereto as Exhibit 34 is a true and correct copy of this Court's Order Granting Defendant Foodland's Motion for Summary Judgment Filed January 26, 2005.

36. Attached hereto as Exhibit 35 is a true and correct copy of Plaintiff's Memorandum in Opposition to Defendant Guidance Software, Inc. and Michael Gurzi's Motion for Summary Judgment.

37. Filed separately under seal as Exhibit 36 is a true and correct copy of the Rule 25(A)(2) Expert Report of Martin G. Walker, Ph.D.

38. Attached hereto as Exhibit 37 is a true and correct copy of this Court's Order Denying Defendants' Motions for Summary Judgment; Order Affirming Magistrate Judge's Adoption of Discovery Master's Order Regarding F-1 Program

Materials filed October 21, 2005.

39. Attached hereto as Exhibit 38 is a true and correct copy of Plaintiff's Memorandum In Opposition to Defendant PCT's Motion for Partial Summary Judgment on Damages filed September 15, 2005.

40. Attached hereto as Exhibit 39 is a true and correct copy of a May 5, 2003 email message from Ron Griffin to Brian Christiansen.

41. Attached hereto as Exhibit 40 is a true and correct copy of Plaintiff's Motion for Leave to File Second Amended Complaint filed January 16, 2004.

42. Attached hereto as Exhibit 41 is a true and correct copy of Plaintiff's RICO Statement, filed June 18, 2004.

43. Attached hereto as Exhibit 42 is a true and correct copy of Plaintiff Wayne Berry's Memorandum in Opposition to Hawaii Transfer Company, Ltd.'s Motion for Summary Judgment filed on October 2, 2004.

44. Attached hereto as Exhibit 43 is a true and correct copy of Plaintiff's Memorandum in Opposition to the C&S Defendants' Counter-Motion for Summary Judgment.

45. Attached hereto as Exhibit 44 is a true and correct copy of Plaintiff Wayne Berry's Statement of Appeal of Order Denying Plaintiff's Request for F-1 Program Materials Filed by Discovery Master Clyde Wm. Matsui, Esq. on August 29, 2005.

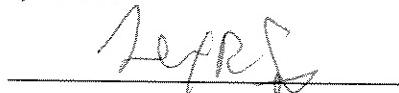
46. Attached hereto as Exhibit 45 is a true and correct copy of excerpts from the transcript of the Deposition of Plaintiff, taken on May 18, 2005.

47. Attached hereto as Exhibit 46 is a true and correct copy of Fleming's Complaint for Declaratory Relief and an Injunction Prohibiting Harassment, filed in Adversary Proceeding Case No. 03-54809, in the United States Bankruptcy Court for the District of Delaware.

48. Attached hereto as Exhibit 47 is a true and correct copy of a May 13, 2005 letter to Honorable Leslie Kobayashi from Special Master Clyde Matsui regarding supplemental proposed schedule.

I declare under penalty of perjury that the statements made herein are true and correct to the best of my knowledge, information and belief.

DATED: Honolulu, Hawaii, January 3, 2006.



Lex R. Smith

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date a true and correct copy of the foregoing was duly served upon the following individuals by hand delivery or United States Post Office, postage prepaid, at their last known address below:

TIMOTHY J. HOGAN, ESQ.
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BRIAN CHRISTENSEN, et al

DATED: Honolulu, Hawaii, January 3, 2006.

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